



ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:
Wulf Cattle Depot
NPDES Permit No. SD-0034606
NPDES Appeal No. 21-01

FOURTH ORDER GRANTING EXTENSION OF STAY

This matter involves the appeal of a National Pollutant Discharge Elimination System ("NPDES") permit issued by the U.S. Environmental Protection Agency Region 8 ("Region") to petitioner Wulf Cattle Depot for a Concentrated Animal Feeding Operation facility located in the town of McLaughlin, South Dakota, within the exterior boundary of the Standing Rock Sioux Reservation. Wulf Cattle Depot filed its notice of appeal on February 19, 2021, together with an unopposed motion for extension of time to file a brief in support. See Wulf Cattle Depot, Notice of Appeal (Feb. 19, 2021). The Board granted Wulf Cattle Depot's motion for an extension of time. Order Granting Extension of Time for Filing Brief in Support of Petition for Review (Feb. 23, 2021) (granting extension through March 31, 2021).

The Region subsequently filed an unopposed motion to stay the proceedings to allow the parties and the Standing Rock Sioux Tribe ("Tribe") to discuss potential resolution of the appeal, followed by four additional status reports, each seeking a further stay of the proceedings. See EPA Region 8, Unopposed Motion to Stay Proceedings (Mar. 23, 2021); EPA Region 8, Status Report and Unopposed Motion for Further Stay of Proceedings (May 17, 2021); EPA Region 8, Second Status Report and Motion for Further Stay of Proceedings (June 25,

2021) (“Second Status Report”); EPA Region 8, Third Status Report and Unopposed Motion for Further Stay of Proceedings (July 12, 2021) (“Third Status Report”); EPA Region 8, Fourth Status Report and Unopposed Motion for Further Stay of Proceedings (Aug. 10, 2021) (“Fourth Status Report”). The Board has granted the Region’s three previous requests for a further stay of proceedings and pending before it is the Region’s fourth request. *See* Order Staying Proceedings for Sixty Days (Mar. 24, 2021) (staying proceedings until May 24, 2021); Order Granting Extension of Stay (May 19, 2021) (staying proceedings until July 1, 2021); Order Granting Further Extension of Stay (June 28, 2021) (staying proceedings until July 15, 2021); Third Order Granting Extension of Stay (July 14, 2021) (staying proceedings until August 16, 2021).

In its Second Status Report, the Region reported that, based on discussions with Wulf Cattle Depot and the Tribe, it had been considering whether to withdraw four permit conditions and issue new draft conditions for public notice and comment—a potential course of action that the Region refers to as the “permit withdrawal option.” Second Status Report at 2. The Region also reported that it had been in communication with the Tribe about the permit withdrawal option and had (virtually) presented information to the Tribe about the option at a Tribal Council meeting. *Id.* at 3. Subsequently, counsel for the Tribe informed the Region that the Tribe opposed the permit withdrawal option. *Id.* at 4.

In its Third Status Report, the Region reported that after filing the Second Status Report, it participated in an additional government-to-government meeting with the Tribe on July 6, 2021. Third Status Report at 3. According to the Region, “[d]uring this tribal consultation meeting, the Region heard a variety of opinions from the Tribal Council, but nothing to suggest that the Council no longer opposes modifying the challenged permit.” *Id.* In addition, the Region reports that, at that meeting, the Tribe “indicated that it wished to pursue dispute

resolution for this matter.” *Id.* at 4. As a result, the acting Director of the Region’s Water Division agreed to refer the question of whether to modify the challenged permit to the acting Regional Administrator for resolution in accordance with the process established in Section IV.E of the *EPA Region 8 Policy for Environmental Protection in Indian Country*.¹ *Id.* at 5. The Region represented that, pursuant to those procedures, the acting Regional Administrator “will consult with ‘the tribal chair, the Director of the American Indian Environmental Office (AIEO), and the Headquarters program office, as appropriate’ before making a final decision.” *Id.* at 5 (quoting *EPA Region 8 Policy for Environmental Protection in Indian Country*, § IV.E, at 6).

In its Fourth (and most recent) Status Report, the Region reports that it had scheduled a meeting for August 5, 2021, with relevant EPA officials and Tribal representatives but had to cancel that meeting “because multiple representatives from AIEO [EPA’s American Indian Environmental Office] were unavailable due to illness.” Fourth Status Report at 4. The Region further reports that “[s]ince that cancellation, the Region 8 Tribal Affairs Branch Chief has been coordinating with the relevant EPA officials and the Tribal representatives to find an available meeting time,” that various options for meeting “within the next two weeks” are being considered, and that “EPA is committed to quickly finding a date and time” for the meeting. *Id.* Based on the anticipated timeline for rescheduling the meeting, the Region believes that the acting Regional Administrator will reach a final decision on whether to modify the permit “by no later than August 26, 2021.” *Id.* at 5.

¹ The *EPA Region 8 Policy for Environmental Protection in Indian Country* is available at: https://www.epa.gov/sites/production/files/2018-04/documents/1996_r8_indian_country_environmental_protection_policy.pdf.


In order to allow sufficient time for the dispute resolution process, the Region now requests a further stay of proceedings for an additional eighteen days after the current stay ends—until September 3, 2021—with a final status report due on August 27, 2021. *Id.* at 5-6. In support, the Region states that extension of the stay will allow sufficient time for the meeting between designated EPA and Tribal officials to take place and for the acting Regional Administrator to consider “whatever additional information the Tribe may provide” in reaching a final decision on the modification option. *Id.* at 5. The Region further represents that allowing for extra time will “assur[e] that the Region conforms to the principles and procedures in the *Region 8 Policy*, as well as allowing the Region to continue to advance the policies established in the *2011 EPA Policy on Consultation and Coordination with Indian Tribes.*” *Id.* The Region states that it contacted counsel for Petitioner Wulf Cattle Depot and that Petitioner does not oppose the motion for extension of the stay. *Id.* at 6.

Accordingly, based on the Region’s representations in its Fourth Status Report, the Board **GRANTS** the Region’s motion and further stays this matter until **Friday, September 3, 2021**. By **Friday, August 27, 2021**, the Region shall file a status report with the Board addressing the status of the dispute resolution process and proposing, if appropriate, a briefing schedule for the appeal. If the parties seek a further stay of proceedings beyond September 3, 2021, the Region shall also file a motion requesting a further stay of the proceedings, including the basis for that motion and the length of the stay being sought. *See* 40 C.F.R. § 124.19(f)(6) & (n).

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: August 12, 2021

By: 

Aaron P. Avila
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **FOURTH ORDER GRANTING EXTENSION OF STAY** in the matter of *Wulf Cattle Depot*, NPDES Appeal No. 21-01, were sent to the following persons by electronic mail:

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Dated: Aug 12, 2021

Emilio Cortes

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Clerk of the Board